



4310-05-P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 935

[OH-255-FOR; Docket ID OSM-2013-012;  
S1D1SSS08011000SX066A00067F144S180110;  
S2D2SSS08011000SX066A00033F14XS501520]

Ohio Regulatory Program

**AGENCY:** Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

**ACTION:** Proposed rule; public comment period and opportunity for public hearing.

**SUMMARY:** OSM announces receipt of a proposed amendment to the Ohio regulatory program under the Surface Mining Control and Reclamation Act of 1977 (SMCRA or the Act). Ohio's proposed amendment is prompted by requirements within the Ohio statute that all agencies must review their administrative rules every five years. Consistent with this requirement, the Ohio Reclamation Commission, (the Commission), proposes an amendment to its procedural rules in order to ensure an orderly, efficient, and effective

appeals process. By submittal of this proposed amendment, Ohio intends to revise its approved program pursuant to the additional flexibility afforded by the revised Federal regulations and SMCRA, as amended, to ensure Ohio's proposed provisions are consistent with and in accordance with SMCRA and no less effective than the corresponding Federal regulations. This document provides the times and locations that the Ohio program and proposed amendment are available for public inspection, the comment period during which you may submit written comments on this amendment, and the procedures that we will follow for the public hearing, if one is requested.

**DATES:** We will accept written comments on these amendments until 4:00 p.m., Eastern Standard Time (EST) [Insert date 30 days after the date of publication in the FEDERAL REGISTER]. If requested, we will hold a public hearing on the amendment on [Insert date 25 days after date of publication in the FEDERAL REGISTER]. We will accept requests to speak at a hearing until 4:00 p.m., EST on [Insert date 15 days after date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by SATS No. OH-255-FOR by any of the following methods:

- *Mail/Hand Delivery:* Mr. Ben Owens, Chief, Pittsburgh Field Division, OSM, 3 Parkway Center, 3rd Floor, Pittsburgh, Pennsylvania 15220.
- *Fax:* (412) 937-2888.
- *Federal eRulemaking Portal:* The amendment has been assigned Docket ID

OSM-2013-0012. If you would like to submit comments, go to

<http://www.regulations.gov> and follow the instructions.

*Instructions:* All submissions received must include the agency name and docket number for this rulemaking. For detailed instructions on submitting comments and additional information on the rulemaking process, see the Public Comment Procedures heading of the **SUPPLEMENTARY INFORMATION** section of this document.

*Docket:* For access to the docket to review copies of the Ohio regulations, this amendment, a listing of any scheduled public hearings, and all written comments received in response to this document, you must go to the address listed below during normal business hours, Monday through Friday, excluding holidays. You may receive one free copy of the amendments by contacting OSM's Pittsburgh Field Division Office; or you can view the full text of the program amendment available for you to read at [www.regulations.gov](http://www.regulations.gov).

In addition, you may review a copy of the amendment during regular business hours at the following locations:

Ben Owens, Chief

Pittsburgh Field Division

OSM

4605 Morse Road, Room 102

Columbus, OH 43230

Telephone: (614) 416-2238, Email: [bowens@osmre.gov](mailto:bowens@osmre.gov);

Lanny E. Erdos, Chief

Division of Mineral Resources Management

Ohio Department of Natural Resources

2045 Morse Road, Building H-2

Columbus, OH 43229-6693

Telephone: (614) 265-6893, Email: [Lanny.Erdos@dnr.state.oh.us](mailto:Lanny.Erdos@dnr.state.oh.us)

Fax: (614) 265-7999.

**FOR FURTHER INFORMATION CONTACT:** Ben Owens, Chief, Pittsburgh Field

Division; Telephone: (614) 416-2238. Email: [bowens@osmre.gov](mailto:bowens@osmre.gov).

**SUPPLEMENTARY INFORMATION:**

- I. Background on the Ohio Program
- II. Description and Submission of the Proposed Amendment
- III. Public Comment Procedures
- IV. Procedural Determinations

## **I. Background on the Ohio Program**

Section 503(a) of SMCRA permits a state to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its program includes, among other things, "a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this SMCRA. . .; and rules and regulations consistent with regulations issued by the Secretary pursuant to this SMCRA." *See* 30 U.S.C. Section 1253(a)(1) and (7). On the basis of these criteria, the Secretary of the Interior conditionally approved the Ohio program effective August 16, 1982. You can find background information on the Ohio program, including the Secretary's findings, the disposition of comments, and the conditions of approval of the Ohio program in the August 16, 1982, Federal Register (41 FR 34688). You can also find later actions concerning Ohio's program and program amendments at 30 CFR 935.11, 935.12, 935.15, and 935.16.

## **II. Description and Submission of the Proposed Amendment**

The Commission is an adjudicatory board established pursuant to Ohio Revised Code (ORC) section 1513.05. The function of the Commission is to provide an administrative appeal to any person claiming to be aggrieved or adversely affected by a decision of the Ohio Department of Natural Resources, Chief of the Division of Mineral Resources

Management (DMRM), relating to mining and reclamation issues. Following an adjudicatory hearing, the Commission affirms, vacates, or modifies the DMRM Chief's decision. The Commission is comprised of eight members appointed by the Governor of Ohio. Four Commission members constitute a quorum and seven members must be present for any appeal. Members represent a variety of interests relevant to mining and reclamation issues. The Commission adopts rules to govern its procedures. These rules are found at Ohio Administrative Code (OAC) sections 1513-3-01 through 1513-3-22. As discussed above, all Ohio agencies must review applicable administrative rules every five years pursuant to ORC section 119.032. Therefore, the Commission conducted a review of its procedural rules in 2013. During this review, the Commission recommended several modifications to its rules, most of which are viewed as non-substantive. The Commission intended these modifications to ensure an orderly, efficient, and effective appeal process. The proposed changes are the subject of this proposed amendment and are discussed herein in the order as they are found in the proposed, modified OAC.

#### 1513-3-01 Definitions.

Changes are proposed to clarify existing definitions and to provide additional definitions. Specifically, the definition of "appellant" is clarified to explicitly state actions of the Chief are the subject of appeal before the Commission. The definition of "final order" clarifies that the resolution of matters presented on appeal will be in writing and consistent with section 1513-3-19 of the OAC. The definition of "full party" is added. It is proposed that this definition will define "full party" to include the appellant, the

appellee, and any intervenor participating in an appeal as defined by the OAC at section 1513-3-07, entitled “Intervention.” Additionally, the term, “interested persons in an appeal pending before the Commission” is added. The new term is proposed to be defined as the appellant, the appellee, any intervenors, and any other persons who have notified the Commission of an interest in a pending appeal and have requested to be notified of hearings in said pending appeal. The definition of “intervenor” is proposed to be modified to remove the word “one” and replace it with the term, “any person.” The definition of “person” is modified to encompass limited liability company. Within the definition of “regular business hours” it is proposed that the terms “chairman” and “vice-chairman” be replaced by “chairperson” and “vice-chairperson,” respectively. The remaining modifications are renumbering to facilitate the addition of new terms.

#### 1513-3-02 Internal regulations.

Section (B) Quorum, was modified to clarify the conditions for satisfying quorum. Additionally, the proposed rule clarifies the procedure in the event concurrence is not reached. The full text of the section is available for your review within the docket.

Furthermore, the proposed rule clarifies that in the event a Commission member considered as part of the quorum misses any part of the proceeding, they must review the record prior to participating in the rendering of a decision. It is proposed that audio-electronic hearings before the Commission constitute the official record of the hearing. However, it is proposed that other methods of creating the official record are permitted

upon the Commission's discretion, joint motion of the parties or by motion of a party and subsequent approval by the Commission. Additionally it is clarified that the issuance and service of subpoenas must comply with the Ohio Rules of Civil Procedure, and as applicable section 119.094 of the ORC, including the fee paid to witnesses outside the county in which a hearing shall be held.

1513-3-03 Appearance and practice before the commission.

The proposed rule clarifies that any party may appear on their own behalf or may be represented by an attorney at law admitted to practice according to Ohio law. This includes the admittance of attorneys pro hac vice.

1513-3-04 Appeals to the reclamation commission.

While the majority of the proposed changes to this section are clerical and non-substantive, the proposed rule clarifies that email addresses, if available, should be included in the notice of appeal. Additionally, as proposed, appellants shall comply with the requirements of section 1513.02 of the ORC, pertaining to the power and duties of the Chief of DMRM, and shall include and forward the amount of the penalty for placement in a penalty fund. The proposed rule also adds a section of what may be included in the appeal. Appellants may, but are not required to, identify the area to which the notice, order or decision relates; state whether or not the Commission is requested to view the site; and state whether or not the appellant waives the right to have the hearing within the time frames established in section 1513.13(B) of the ORC.



#### 1513-3-05 Filing and service of papers.

This section of the proposed rule clarifies that the filing of a notice of appeal must conform to section 1513.13 of the ORC, Appeal to the Commission. The proposed rule alters the definition of when a notice of appeal is deemed filed. It is proposed that a notice of appeal will be deemed filed when received or if the notice of appeal is sent by certified mail, registered mail, or express mail, it shall be deemed filed on the date of the postmark date placed upon the sender's receipt by the postal service. However, documents requesting temporary relief are proposed to only be deemed filed when received by the Commission. Additionally, it is proposed that all filings other than a notice of appeal or a request for temporary relief, that are not sent to the Commission by certified mail, registered mail, or express mail shall be deemed filed with the Commission on the day on which the filings are received and those that are sent by such means, shall be deemed filed on the postmark date placed upon the sender's receipt by the postal service. It is further proposed that following initiation of an appeal, the Commission may, through order, establish a filing and service protocol, which may include the electronic transmission of documents.

#### 1513-3-06 Computation and extension of time.

The majority of the proposed changes to this section are non-substantive and consist of renumbering for clarity. However, it is proposed that section (C)(1), be altered to

definitely read that the Commission may not lengthen or reduce the time period allowed for any response or filing a request for temporary relief.

#### 1513-3-07 Intervention.

The proposed rule would require a petition for leave to intervene to be filed at least ten days prior to the beginning of an evidentiary hearing on the merits of an appeal, unless waived by the Commission for extraordinary cause. Additionally, it is proposed that a provision be added to allow the filing of amicus briefs and oral argument at hearing by amicus curiae upon leave by, and at the discretion of, the Commission.

#### 1513-3-08 Temporary relief.

Proposed changes to this section are non-substantive and primarily propose language to make references gender neutral.

#### 1513-3-10 Discovery.

The proposed rule alters the current discovery rules by clarifying parties to an appeal may obtain discovery in accordance with the provisions of rules 26 through 36 of the Ohio Rules of Civil Procedure. Additionally, the rule explains that all parties, including intervenors, are subject to discovery and discovery from non-parties must be done through subpoena. It is proposed that if a party fails to obey an order to compel or permit discovery issued by the Commission, the Commission may make such orders in regard to the failure as it deems just.

#### 1513-3-11 Motions.

It is proposed that section (B) be removed. Currently, this section allows a party to make a written motion requesting that a hearing be conducted before the full Commission, rather than before a hearing officer for the Commission. However, this election is preserved and will be enumerated in section 1513-3-18, Reports and recommendations of the hearing officer. It is also proposed that objections to jurisdiction are non-waivable and may be raised at any point in an appeal, consistent with the Ohio Rules of Civil Procedure.

#### 1513-3-12 Pre-hearing procedures.

The proposed rule would allow the Commission or its hearing officer, at its own initiative or at the request of any party, to schedule and hold pre-hearing conferences regarding issues on appeal.

#### 1513-3-14 Site views and location of hearings.

The proposed rule specifies the locations of Commission hearings. It also establishes the circumstances in which the Commission will conduct site views of mining operations, reclamation operations, or other relevant features. As proposed, the rule also explicitly states that the Commission shall control and direct the manner of conducting a site view. Specifically, it is proposed that where a site view is conducted on property subject to a mining and reclamation permit, parties shall be informed prior to the site view of any

necessary personal protective equipment, including hard hat, safety glasses, hearing protection, safety-toed shoes or boots and additional equipment as may be required on mine property as determined by the mine operator. Additionally, the Commission reserves the right to limit the number of persons who participate in the site view. Additionally, it is proposed to alter the rule so that a hearing related to a cessation of mining or a motion for temporary relief is held in proximity to the subject area of the hearing for the convenience of the Commission and the parties. All other proceedings will continue to be held in Columbus, Ohio or at any convenient public location selected by the Commission.

1513-3-15 Consolidation of proceedings.

It is proposed that the Commission be given the right to administer consolidated appeals in the manner it deems most appropriate.

1513-3-16 Conduct of evidentiary hearings.

The proposed rule applies to any person participating in an appeal before the Commission and definitively states that the Commission shall determine the conduct of the hearing and the order of the presentation of evidence. Additionally, it further clarifies that the Commission is not bound by the formal rules of evidence as promulgated by the Ohio Supreme Court. The proposed rule also establishes a procedure for in camera inspection of documents claimed to contain proprietary business information or trade secrets. Additionally, the proposed rule specifically details the number of copies of proposed

exhibits a party must make available. In regard to written testimony, it is proposed that affidavits may be admitted only if the evidence is otherwise admissible and all full parties agree that affidavits may be used in lieu of oral testimony. This proposed alteration is limiting as it adds the adjective “full,” thus excluding certain parties. It is also proposed that parties wishing to use affidavits in lieu of oral testimony serve all full parties with a copy of the affidavit at least 15 days prior to a hearing. It is clarified that in the event a declarant is unavailable, testimony may be offered in compliance with Rule 804 of the Ohio Rules of Evidence. As proposed, objections to deposition testimony shall be resolved in accordance with Rule 32 of the Ohio Rules of Civil Procedure. Further, it is proposed that in instances when a party is attempting to use written testimony, any full party shall present the Commission a schedule of objections to the written testimony prior to the commencement of the hearing. This is a change to the current rule that allows objection at the hearing following receipt of the testimony into evidence. In regard to the presentation of witnesses, it is proposed that the Commission may require that a witness be called only once during a hearing and that the parties conduct all examinations at the time when the witness is called to testify. It is proposed that an Ohio notary be given authority to administer oaths and affirmations to witnesses. Further, it is proposed that the Commission be given authority to require the parties to submit written closing arguments, post-hearing briefs or proposed findings of fact and conclusions of law.

1513-3-17 Voluntary dismissal and settlement.

It is proposed that the adjective “full” be added to section (B), relative to agreement to settle. Therefore, this is limiting as not all parties may be required to reach an agreement to settle. It is also proposed that if an appeal is settled during the course of a hearing, the parties shall enter into the record a statement acknowledging that they have reached an agreement that all issues have been resolved, and that a withdrawal of the appeal will be filed.

#### 1513-3-18 Reports and recommendations of the hearing officer.

It is proposed that section 1513-3-11(B) be replaced here. This section allows a party to make a written motion requesting that a hearing be conducted before the full Commission, rather than before a hearing officer for the Commission. Additionally, it is proposed that in the event a decision before a hearing officer must be rendered within a specified time period, the appeal will be heard by the Commission rather than by a hearing officer, unless there has been a waiver of the right to an expedited hearing.

#### 1513-3-19 Decisions of the commission.

This proposed rule clarifies the procedures the Commission will follow in issuing its decisions. Additionally, as proposed, the rule allows the remission, within thirty days after issuing a final decision, of pre-paid civil penalties, where penalties are under appeal. The proposed rule also provides more detailed information regarding the procedures that will be followed if errors are found in Commission decisions. Specifically, it is proposed that during the time period after a final decision has been issued by the Commission,

clerical mistakes in the final decision and errors therein from oversight or omission may be corrected before an appeal of the Commission's final decision is filed. Thereafter, while an appeal is pending before an appellant court, a final decision may be so corrected with leave of the court. As proposed, the correction of a clerical mistake or error in a final decision does not extend the time for filing a notice of appeal in the appellate court.

#### 1513-3-20 Costs.

It is proposed that this section be rescinded. As it currently exists, this section allowed the Commission to assess costs against a party to an appeal. The Commission does not assess such costs, and the rule has not been used by the Commission. Moreover, there are no filing fees associated with Commission appeals.

#### 1513-3-21 Award of costs and expenses.

As proposed, this rule clarifies the previous version of this rule approved by OSM in 2004. The intent is to make it clearer that the Commission is only authorized to directly hear petitions for costs, including attorneys' fees, and expenses where petitions are filed by the DMRM and allege bad faith or harassment by another party. As proposed, such petitions must conform to the ORC. Petitions by the DMRM must include an affidavit detailing all costs and expenses, receipts, and when attorneys' fees are requested, evidence that the hours expended and the fees requested are reasonable for the appeal and for the locality. Decisions relevant to award of costs and expenses are appealable pursuant to the OAC and ORC.

### 1513-3-22 Appeals from commission decisions.

As proposed, this rule clarifies that parties to actions involving coal mining and reclamation raised under section 1513 of the ORC may seek review of a Commission decision in the court of appeals for the county, in which the activity addressed by the decision of the Commission occurred, is occurring or will occur. Moreover, as proposed, this rule clarifies that parties to actions involving industrial minerals mining and reclamation and brought under section 1514 of the ORC may seek review of a Commission decision in the court of common pleas in the county where the operation addressed by the decision of the Commission is located or in the Franklin County Court of Common pleas. Additionally, the proposed rules provides the Commission with the authority to control the transcription and transmission of the record to the appropriate appellate court.

### **III. Public Comment Procedures**

Under the provisions of 30 CFR 732.17(h), OSM is seeking your comments on whether Ohio's proposed amendment satisfies the applicable program approval criteria of 30 CFR 732.15. If OSM approves the amendment, it will become part of Ohio's program.

#### Electronic or Written Comments



If you submit written comments, they should be specific, confined to issues pertinent to the proposed regulations, and explain the reason for any recommended change(s). OSM appreciates any and all comments, but those most useful and likely to influence decisions on the final regulations will be those that either involve personal experience or include citations to and analyses of SMCRA, its legislative history, its implementing regulations, case law, other pertinent State or Federal laws or regulations, technical literature, or other relevant publications.

OSM cannot ensure that comments received after the close of the comment period (see **DATES**) or sent to an address other than those listed (see **ADDRESSES**) will be included in the docket for this rulemaking and considered.

#### Public Availability of Comments

Before including your address, phone number, e-mail address, or other personal identifying information in your comment, you should be aware that your entire comment including your personal identifying information may be made publicly available at any time. While you can ask OSM in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

#### Public Hearing

If you wish to speak at the public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT** by 4:00 p.m., EST, on [Insert date 15 days

after date of publication in the FEDERAL REGISTER]. If you are disabled and need reasonable accommodations to attend a public hearing, contact the person listed under **FOR FURTHER INFORMATION CONTACT**. OSM will arrange the location and time of the hearing with those persons requesting the hearing. If no one requests an opportunity to speak, OSM will not hold a hearing.

To assist the transcriber and ensure an accurate record, OSM requests, if possible, that each person who speaks at the public hearing provide us with a written copy of his or her comments. The public hearing will continue on the specified date until everyone scheduled to speak has been given an opportunity to be heard. If you are in the audience and have not been scheduled to speak and wish to do so, you will be allowed to speak after those who have been scheduled. OSM will end the hearing after everyone scheduled to speak and others present in the audience who wish to speak, have been heard.

#### Public Meeting

If only one person requests an opportunity to speak, we may hold a public meeting rather than a public hearing. If you wish to meet with OSM to discuss the amendment, please request a meeting by contacting the person listed under **FOR FURTHER INFORMATION CONTACT**. All such meetings are open to the public; if possible, we

will post notices of meetings at the locations listed under **ADDRESSES**. We will make a written summary of each meeting a part of the administrative record.

#### **IV. Procedural Determinations**

### Executive Order 12866 - Regulatory Planning and Review

This rule is exempted from review by the Office of Management and Budget (OMB) under Executive Order 12866.

### Other Laws and Executive Orders Affecting Rulemaking

When a State submits a program amendment to OSM for review, regulations at 30 CFR 732.17(h) require OSM to publish a notice in the Federal Register indicating receipt of the proposed amendment, its text or a summary of its terms, and an opportunity for public comment. OSM concludes review of the proposed amendment after the close of the public comment period and determine whether the amendment should be approved, approved in part, or not approved. At that time, OSM will also make the determinations and certifications required by the various laws and executive orders governing the rulemaking process and include them in the final rule.

### List of Subjects in 30 CFR Part 935

Intergovernmental relations, Surface mining, Underground mining.

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Thomas D. Shope,  
Regional Director, Appalachian Region

February 10, 2014  
Date

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